UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Anthony J. Baratta
Dr. Mark O. Barnett

In the Matter of	Docket No. 52-042
EXELON NUCLEAR TEXAS HOLDINGS, LLC	ASLBP No. 11-908-01-ESP-BD01
(Victoria County Station Site)	August 10, 2011

INITIAL SCHEDULING ORDER

This proceeding concerns the application of Exelon Nuclear Texas Holdings, LLC (Applicant or Exelon) for an early site permit (ESP) for the Victoria County Station (VCS) site in Victoria County, Texas. In its June 30, 2011 decision in LBP-11-16, this Board granted the petition to intervene of Texans for a Sound Energy Policy (Intervenor or TSEP) challenging Exelon's ESP application, and admitted, at least in part, eight of TSEP's proffered contentions for litigation in this proceeding.[1] Pursuant to 10 C.F.R. § 2.332(a), this Board must issue an initial scheduling order "as soon as practicable" after a petition to intervene or request for hearing is granted.[2] This Board has the "duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order."[3] Accordingly, this initial scheduling order is designed to ensure proper case management of this proceeding, including "expediting the disposition of the proceeding,

[1] LBP-11-16, 73 NRC __, __ (slip op. at 80) (June 30, 2011).

[2] 10 C.F.R. § 2.332(a); see also 10 C.F.R. Part 2, Appendix B, II, Model Milestones for Hearing Conducted Under 10 C.F.R. Part 2, Subpart L (Initial scheduling order to be issued within 55 days of Board decision granting intervention and admitting contentions).

[3] 10 C.F.R. § 2.319.

establishing early and continuing control so that the proceeding will not be protracted because of lack of management, discouraging wasteful prehearing activities, improving the quality of the hearing . . . and facilitating settlement."[4]

I. BACKGROUND

On March 25, 2010, Exelon applied under 10 C.F.R. Part 52, Subpart A, for an ESP for the VCS site.[5] On November 23, 2010, the Commission published a notice of hearing and opportunity to petition for leave to intervene in the ESP proceeding.[6] The notice informed those persons whose interest would be affected by the proposed ESP of the opportunity to file, within sixty days, a request for a hearing and petition for leave to intervene in accordance with 10 C.F.R. § 2.309.[7] On January 24, 2011, Texans for a Sound Energy Policy (Intervenor or TSEP) filed a timely petition to intervene challenging various aspects of Exelon's ESP application, including its Site Safety Analysis Report (SSAR) and its Environmental Report (ER).[8] On June 30, 2011, the Board ruled, inter alia, that Intervenor had standing to challenge Exelon's ESP application and had presented at least one contention that met the admissibility criteria of 10

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[4] Id. § 2.332(c)(1)-(5).

[5] See Exelon Nuclear Texas Holdings, LLC, Early Site Permit Application for the Victoria County Station Site, Notice of Hearing, Opportunity To Petition for Leave To Intervene, and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 75 Fed. Reg. 71,467, 71,468 (Nov. 23, 2010); see also Exelon Nuclear Texas Holdings, LLC; Notice of Receipt and Availability of Application for an Early Site Permit, 75 Fed. Reg. 22,434, 22,434 (Apr. 28, 2010). A publicly available version of the Exelon ESP application for the VCS can be found on the NRC's website at http://www.nrc.gov/reactors/new-reactors/esp/victoria.html (last visited August 6, 2011). Under the Part 52 licensing process that governs Exelon's application for the VCS site, an entity may apply for an ESP that, if granted, would authorize it to resolve key site-related environmental, safety, and emergency planning issues before selecting the design of a nuclear power facility for the subject site. See 10 C.F.R. Part 52, Subpart A.

[6] See 75 Fed. Reg. at 71,468.

[7] Id.

[8] See Texans for a Sound Energy Policy's Petition to Intervene and Contentions (Jan. 24, 2011) [hereinafter Petition].

C.F.R. § 2.309(f)(1).[9] Accordingly, the Board granted Intervenor's petition and admitted eight of its submitted contentions at least in part.[10]

On July 6, 2011, Exelon submitted an agreement of the parties regarding mandatory discovery disclosures and therein requested that we adopt that agreement as part of our initial scheduling order.[11] On July 11, 2011, pursuant to 10 C.F.R. §§ 2.329 and 2.332, the Board issued an Order setting a date and time for a scheduling conference for the purpose of developing a scheduling order to govern the conduct of this proceeding.[12] In accordance with that order, the NRC Staff submitted its projected schedule for completion of its safety and environmental reviews on July 20, 2011.[13] On July 28, 2011, the Board conducted the initial scheduling conference.[14] Later, on August 4, 2011, the parties submitted a second agreement following up on issues discussed at the initial scheduling conference and again requesting that the Board adopt the points of that agreement as part of the initial scheduling order for this proceeding.[15] Based on the parties' agreements, the parties' statements at the conference, the NRC Staff's projected review schedule, the regulatory requirements and the nature and circumstances of this case, the Board now issues this initial scheduling order.

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[9] LBP-11-16, 73 NRC at __ (slip op. at 80).

[10] See id.

[11] Letter from Steven P. Frantz, Morgan, Lewis & Bockius LLP, to Licensing Board (July 6, 2011) (Agreement of the Parties Regarding Mandatory Discovery Disclosures) [hereinafter Agreement of the Parties].

[12] Licensing Board Order (Scheduling Initial Scheduling Conference) (July 11, 2011) at 1 (unpublished).

[13] See Letter from Sarah W. Price, Counsel for the NRC Staff to Licensing Board (July 20, 2011) (Projected Schedule for Completion of the NRC Staff's Safety and Environmental Reviews).

[14] See Tr. at 252-94.

[15] Letter from Jonathan Rund, Morgan, Lewis & Bockius LLP, to Licensing Board (Aug. 4, 2011) (Agreement of the Parties Regarding Initial Scheduling Order Issues) [hereinafter Second Agreement of the Parties].

II. SCHEDULE

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the Board establishes the following initial schedule for this matter. Consistent with 10 C.F.R. § 2.306(a), if any deadline prescribed by this scheduling order would fall on a Saturday, Sunday, Federal legal holiday, or a day on which NRC headquarters is not open for business due to an emergency closure of the Federal Government in Washington, D.C., then the deadline will be considered to fall on the next day that is not a Saturday, Sunday, Federal legal holiday, or emergency closure.

A. Mandatory Disclosures and Production of Hearing File

The regulations specify that, within thirty (30) days of the Board's ruling admitting contentions, the parties must make certain mandatory disclosures.[16] In addition, Subpart L proceedings require the NRC Staff to produce a hearing file and make it available to all parties.[17] Pursuant to the Agreement of the Parties on Mandatory Discovery Disclosures, and in accordance with 10 C.F.R. § 2.336, the parties commenced their initial disclosures on July 28 and August 1, 2011.

1. Updating of Disclosures

The regulations specify that the parties have a "continuing" duty to update their mandatory disclosures,[18] and that the NRC Staff has a "continuing" duty to update the hearing file.[19] Based on the Agreement of the Parties and discussions during the July 11, 2011 conference, the Board directs the parties to update their disclosures and the hearing file monthly, on the fifteenth (15th) day of each month, beginning on August 15, 2011. Each update

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[16] 10 C.F.R. § 2.336(a), (b).

[17] Id. § 2.1203(a).

[18] Id. § 2.336(d).

[19] Id. § 2.1203(c).

shall cover all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party (or its agents) on or before the last day of the preceding month. Following issuance of the FSER or FEIS, as applicable, the continuing obligation of the parties to disclose information or documents will revert to the fourteen-day update period required by 10 C.F.R. § 2.336(d). As stated in their agreement, all parties may, at their option, update their disclosures under 10 C.F.R. § 2.336(d) through use of e-mail alone. The NRC Staff, however, will make the Hearing File available via the NRC's Electronic Hearing Docket (EHD).

2. Privilege Logs

The regulations require that the parties provide privilege logs, i.e., a "list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents."[20] The parties agreed to waive the requirement in 10 C.F.R. §§ 2.336(a)(3) and 2.336(b)(5) to produce a privilege log.[21] The parties will produce as part of their disclosures a list of all documents withheld as proprietary, security-related, or safeguards Information.[22] The parties shall preserve and maintain all discoverable privileged documents during the pendency of this proceeding.[23]

3. Scope of Disclosures and Hearing File

a. The Board accepts and adopts the agreement of the parties related to mandatory discovery disclosures in the following respects:

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[20] Id. § 2.336(a)(3); see also 10 C.F.R. § 2.336(b)(5). 10 C.F.R. § 2.336(a)(3) and (b)(5) cover documents claimed to be privileged and documents claimed to be protected. In both cases, the party must identify and list the document "together with sufficient information for assessing the claim of privilege or protected status." Id.

[21] Agreement of the Parties at 2.

[22] Id. at 2. See, e.g., 10 C.F.R. § 2.390(a)(1), (3), and (4).

[23] Agreement of the Parties at 2.

(1) A party need not identify or produce a document that has previously been served on the other parties to this proceeding.

(2) A party need not produce documents that are publicly available, but the parties shall produce a log of such documents that details where they can be obtained, e.g., the NRC's Agency wide Documents Access and Management System (hereinafter ADAMS), webpages, libraries, or publishing houses.

(3) A party need not identify or produce documents that contain only administrative information related to a contention, such as notices of upcoming meetings or telephone calls, records of time and expenses, billing statements, and similar documents.

(4) A party need not identify or produce press clippings.

(5) To the extent reasonably practicable, each party will provide electronic copies of the requested documents. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. Except for spreadsheets, multimedia files, and other files that would not be reasonably usable in PDF format, a party need only produce a document electronically in PDF format, rather than in its original format (whether hard copy or electronic). The producing party will use its best efforts to produce the document in a word searchable format. A party need not produce the same electronically stored information in more than one form.

(6) If a relevant e-mail communication exists in multiple locations, the producing party need produce only one copy of that e-mail communication. If the e-mail communication exists in both sender

and recipient e-mail folders, the producing party need only produce the sender's copy of the e-mail. If a chain or string of e-mails exists the party need only produce the last e-mail in the chain or string provided that it includes all of the previous e-mails and recipients of the chain or string.

(7) All documents that are required to be disclosed pursuant to 10 C.F.R. § 2.336(b) and that are available via the NRC's website or through ADAMS shall be specifically identified by the NRC Staff, as required under 10 C.F.R. §§ 2.336(b) and 2.1203. Documents so disclosed and so identified need not be identified or produced by any other party.[24]

(8) In accordance with the provisions of 10 C.F.R. § 2.336(a)(1), each of the parties shall identify any person on which it may rely upon as a witness as soon as the identity of that person becomes known. Depending on the testimony eventually filed by the parties, the parties reserve the right to present rebuttal witnesses not previously identified in these mandatory disclosures.

b. The Board declines to accept and adopt the entirety of the agreement of the parties related to mandatory discovery of "draft" documents.[25] The Board directs the parties with regard to "draft" and "final" document disclosures as follows. Where a party has generated a particular document that otherwise would be required to be disclosed, it may limit its mandatory disclosures to its final version of such document and need not include its internal drafts,

[24] At the evidentiary hearing stage, however, the Board may require the NRC Staff or the parties to produce separate electronic or paper copies of certain important documents such as the FEIS, FSER, and ESP Application.

[25] Agreement of the Parties at 1; Second Agreement of the Parties at 1-2.

including comments on drafts, resolution of comments, draft transmittals, or other similar documents. However, if a document, otherwise qualifying as a draft has been shown by one party (or its agents) to another party (or its agents), then that document does not qualify as an exempt draft and it must be promptly disclosed to the other parties. Examples of documents that must be disclosed and that do not qualify as an exempt draft include (a) a "draft" response to an RAI that the Applicant has shown to the NRC Staff, (b) a draft guidance document that the NRC Staff has shown to the Applicant, or (c) a draft document that the NRC Staff reviewed during a conference with the Applicant. Provided, however, non-docketed Applicant information that is reviewed by NRC Staff during an audit or inspection, but that is not removed from the Applicant's site, need not be disclosed if it otherwise qualifies as a "draft" document. The duty to disclose such draft documents does not depend on whether the person with whom the document was shared took possession, custody or control of the document, and does not depend on the locus where the sharing occurred. Further, if a party has legal possession, custody, or control of a document that it or its contractors did not generate or that is already publicly available, and which is otherwise subject to mandatory disclosure (e.g., relevant to a contention), then the party must produce that document (even if it is labeled "draft").

4. Electronically Stored Information

a. Reasonable Search. Mandatory disclosures and the production of the hearing file shall include electronically stored information and documents [hereinafter ESI]. To satisfy this disclosure obligation, each party shall conduct a reasonable good faith search for all documents or information, including ESI, subject to the mandatory disclosure and hearing file requirements. Each production or disclosure shall include a signed affidavit attesting that the party has conducted such a search, and that the disclosure or production excludes only (a) documents or

information exempted from disclosure pursuant to the law, including NRC regulations or this order, and (b) information that is not reasonably accessible because of undue burden or cost.[26]

b. Format of Production. The parties have agreed to disclose all ESI pursuant to the preceding paragraph in electronic form that is word searchable, to the extent reasonably practicable, as described in section II.A.3.a.(5) supra.

5. Termination

The duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing. If a contention has been dismissed through summary disposition or for other reasons (e.g., mootness), the duty to update mandatory disclosures shall terminate with respect to that contention upon issuance of the Board order dismissing that contention. Pending appellate review of a Board decision disposing of a contention, parties should preserve and maintain disclosures relating to that contention, despite termination of the duty to update the disclosures for that contention.

B. Disclosure Disputes and Motions to Compel

On or before September 1, 2011, the parties shall file any motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected, concerning any disclosures occurring prior to that date. Thereafter, any such motion or challenge shall be filed within ten (10) days[27] after the occurrence or circumstance from which the motion arises, in accordance with 10 C.F.R. § 2.323(a).[28]

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[26] Cf. Fed. R. Civ. P. 16(b)(5) (scheduling order to include "provisions for disclosure of electronically stored information"); Fed. R. Civ. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

[27] If the parties believe that it will facilitate the amicable resolution of privilege claim disputes without the intervention of the Board, the parties may propose to the Board a modification to the ten-day rule and/or other dispute resolution mechanisms.

[28] For example, an objection to the claim that a document qualifies for protection as a

C. NRC Staff Submission of Status Reports

Commencing on September 1, 2011, the NRC Staff shall submit a short report specifying its best estimate of the dates it expects to issue the draft and final version of the Environmental Impact Statement (hereinafter DEIS and FEIS), the Advanced Final Safety Evaluation Report (hereinafter AFSER) and the Final Safety Evaluation Report (hereinafter FSER), and the dates when it understands that the Advisory Committee on Reactor Safety (hereinafter ACRS) and its relevant subcommittees plan to issue any reports concerning the VCS's proposed ESP. Thereafter, to the extent the NRC Staff changes any of these date estimates, the NRC Staff shall submit an updated status report stating these revised date estimates on the first day of the month following the month in which the NRC Staff becomes aware of such change.

D. Requests For Subpart G Proceeding Based on Disclosures of Eyewitness

A request that a contention or other contested matter be handled pursuant to Subpart G procedures based on 10 C.F.R. § 2.310(d) (which focuses, inter alia, on issues "where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness . . .")[29] shall be filed as follows:

1. For witnesses identified in the July 28, 2011, August 1, 2011, or August 15, 2011 mandatory disclosures, on or before September 1, 2011; and
2. For additional witnesses identified by an opposing party in subsequent mandatory disclosures, within twenty (20) days of said event.

"proprietary" document must ordinarily be filed within ten (10) days of the service of the privilege log where that document was first added.

[29] Mandatory disclosures by the parties include the disclosure of "the name . . . of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion." 10 C.F.R. § 2.336(a)(1).

E. Additional Contentions

1. Consolidated Briefing

In the event a party seeks leave to file a new or amended contention (timely or untimely), it shall file its motion for leave and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention. Within seven (7) days of service of the answer, the movant may file a reply responding to the answer.[30]

2. Timeliness

A motion and proposed new contention specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed either within thirty (30) days of the date when the new and material information on which it is based first becomes available to the public (e.g., accessible through the public version of ADAMS) or otherwise obtained by or provided to TSEP, whichever is sooner, or within forty (40) days of the issuance of the DEIS with respect to any new and material information contained therein. If filed thereafter, the motion and proposed contention shall be deemed non-timely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file a motion pursuant to both, and such motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).

[30] This procedure resolves confusion concerning the interplay of the sequence and timing for motions under 10 C.F.R. §§ 2.309(f)(2) and 2.323 (motion, answer), and the sequence and timing for contentions under 10 C.F.R. § 2.309(h) (contention, answer, reply). Further, this procedure expedites the process by collapsing the two-step process envisioned by the regulations into a single step.

3. Selection of Hearing Procedures

A motion and proposed new contention specified in section II.E.1 above may address the selection of the appropriate hearing procedure for the proposed new contention.[31]

F. Pleadings and Motions – Generally

1. Pleadings – Page Limitation

Motions and answers to motions shall not exceed fifteen (15) pages in length (including signature page but excluding attachments, see section II.J.5, infra). A motion for leave to exceed this page limitation must be filed no less than three (3) business days prior to the time the motion or answer is due to be filed. A motion to exceed this page limitation must (i) indicate whether the request is opposed or supported by the other participants to the proceeding; (ii) provide a good faith estimate of the number of additional pages that will be filed; and (iii) demonstrate good cause for being permitted to exceed the page limitation.

2. Response to New Facts or Arguments in Answer Supporting a Motion

Except for a motion to file a new or amended contention as set forth in section II.E. supra, or where there are compelling circumstances, the moving party has no right to reply to an answer or response to a motion.[32] However, if any party files an answer that supports a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a response to any new facts or arguments presented in that answer. Except as otherwise specified herein, no further supporting statements or responses thereto will be entertained.[33]

3. Motion for Leave to File Reply

If a party seeks to file a reply to an answer to a motion (other than a motion to file a new or amended contention as set forth in section II.E supra), it must first obtain leave of the Board.

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[31] See 10 C.F.R. §§ 2.309(g) and 2.310(d).

[32] See id. § 2.323(c).

[33] This provision is modeled on 10 C.F.R. § 2.710(a).

A motion for leave to file such a reply shall be submitted no less than three (3) business days prior to the time the reply would need to be filed.[34] In addition to all other requirements, a motion for leave to file a reply to an answer to such motion must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate good cause for permitting the reply to be filed.

4. Motion for Extension of Time

A motion for extension of time shall be submitted in writing at least three (3) business days before the due date for the pleading or other submission for which an extension is sought. In addition to all other requirements, a motion for extension of time must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate appropriate cause that supports permitting the extension.

5. Answer Opposing a Motion to Exceed the Page Limitation, for Leave to File a Reply, or to Extend the Time for Filing a Pleading

An answer to a motion to exceed the page limit, for leave to file a reply, or to extend the time for filing a pleading shall be filed and served on the next business day after the filing of the request.

6. Motion Certification

In accordance with 10 C.F.R. § 2.323(b), an opposed motion will be rejected if it does not include the following certification by the attorney or representative of the moving party: "I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful."[35]

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[34] Although the agency's rules of practice regarding motions do not provide for reply pleadings, the Board will deem a reply to be timely if filed within seven (7) days of the date of service of the response it is intended to address. See 10 C.F.R. § 2.309(h)(2).

[35] Although in general the movant has only ten (10) days within which to file its motion under 10 C.F.R. § 2.323(a), the spirit of the rules is that such motions should be timely, i.e., not initiated

7. Answer Certification

If the attorney or representative of a party is contacted pursuant to the consultation requirement of 10 C.F.R. § 2.323(b), counsel for the non-moving party must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion. If counsel for the non-moving party is unaware of any attempt by the moving party to contact him or her, the answer to the motion shall so certify. Otherwise, an answer to a motion will be rejected if it does not include the following certification by the counsel for the non-moving party (or his or her alternate): "I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful."

It is inconsistent with the dispute avoidance/resolution purposes of 10 C.F.R. § 2.323(b), and thus insufficient, for counsel for the non-moving party to fail or refuse to consider the substance of the consultation attempt, or for the non-moving party to respond that it takes no position on the motion (or issues) but reserves the right to file a response to the motion when it is filed.

8. Supplemental Information

The certifications specified in the foregoing two subsections may be supplemented with any additional information that the representative or attorney deems necessary to ensure the accuracy of the certification or to explain the situation.

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at the last minute, but instead should be commenced sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question. See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 128 (2006). If the initial consultation is initiated at a reasonable time and the parties believe that all or part of the matter may be resolved amicably if additional time for filing the motion were provided, the parties are encouraged to file a joint motion requesting an extension of time.

G. Dispositive Motions

Motions for summary disposition and other dispositive motions, while permissible,[36] will be managed in this proceeding in accordance with the following requirements.

1. Certification

A dispositive motion (e.g., motion for summary disposition or motion to dismiss) will be rejected unless, in addition to the signature requirements of 10 C.F.R. § 2.304(d) and the certifications required by 10 C.F.R. § 2.323(b) and this order, the motion includes the following certification by counsel for the moving party:

> I certify that this motion is not interposed for delay, prohibited discovery, or any other improper purpose, that I believe in good faith that there is no genuine issue as to any material fact relating to this motion, and that the moving party is entitled to a decision as a matter of law, as required by 10 C.F.R. §§ 2.1205 and 2.710(d).[37]

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[36] The Commission has stated that

> [t]here may be times in the proceeding where motions for summary disposition should not be entertained because consideration of the motion would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues or distracting other parties and the presiding officer from their preparation for a scheduled hearing. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The presiding officer . . . is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide presiding officers the flexibility to make that determination in most proceedings.

Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2186 (Jan. 14, 2004). Subsequently, the Commission issued a notice in an expedited case prohibiting summary disposition motions from proceeding absent an affirmative finding by the Board that it would expedite the proceeding. ("[T]he Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Licensing Board finds that such motions, if granted, are likely to expedite the proceeding."). Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation; In the Matter of Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility), 74 Fed. Reg. 38,052, 38,057 (July 30, 2009).

[37] See 10 C.F.R. § 2.304(d) (Representations of a Signatory to a Pleading); cf. Fed. R. Civ. P 11(b).

2. Additional Time for Dispositive Motions

In order to accommodate careful consultation as specified above, dispositive motions are to be filed within twenty (20) days after the occurrence or circumstance giving rise to the motion (rather than the ten (10) day time frame established by 10 C.F.R. § 2.323(a)), provided that the moving party commences sincere efforts to contact and consult all other parties within ten (10) days of such occurrence or circumstance, and the accompanying certification so states.

3. Answers

In accordance with 10 C.F.R. § 2.1205(b), an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within twenty (20) days after service of the motion.[38]

4. Continuance

If it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party "cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition," the Board may refuse the application for summary disposition or may order a continuance as may be necessary or just.[39]

5. Deadline

With regard to any contention based on 10 C.F.R. Part 51 or the National Environmental Policy Act, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the FEIS.[40] With regard to any other

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[38] See also section II.F.5. supra.

[39] See 10 C.F.R. § 2.710(c); cf. Fed. R. Civ. P. 56(f).

[40] Consistent with the Commission's scheduling instructions in another proceeding, see 74 Fed. Reg. 38,057 (July 30, 2009), if all contentions, other than Part 51 and NEPA contentions, have been dismissed when the FEIS is published, then no answer to a motion for summary disposition or other dispositive motion filed after publication of the FEIS is required, nor appropriate, unless and until ten (10) days after the Board issues an affirmative determination that the motion will not interfere with preparations and filings related to the evidentiary hearing and that its resolution will serve to expedite the proceeding. The Board will endeavor to make such determination within ten (10) days.

contention or issue, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the AFSER.

H. Clarification, Simplification, and Amendment of the Pleadings

The Board encourages the parties to continue to consider and pursue opportunities for the settlement of issues or contentions, as specified in 10 C.F.R. §§ 2.329(c)(1)-(3) and 2.338, including the potential: (1) clarification, simplification, or specification of the issues; (2) necessity or desirability of amending the pleadings; (3) opportunities to develop stipulations or admissions of fact; and (4) opportunities for the settlement of issues or contentions.

The Board will revisit these issues throughout this proceeding. For example, if it appears that stipulations or admissions of fact can narrow or eliminate factual or legal disputes, the parties are encouraged to consult with each other and/or file motions to pursue same.

I. Evidentiary Hearing Filings

The Board currently contemplates bifurcating the evidentiary hearing on contentions in this proceeding into two separate hearing sessions – one addressing the safety contentions and the other addressing the environmental contentions. Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing. The Board has determined that the earliest practicable trigger date for the initiation of such filings associated with admitted safety contentions is the date when the NRC's ACRS makes its final report on the AFSER publicly available. This shall be the "trigger date" for the filings associated with the evidentiary hearing on admitted safety contentions in this proceeding.[41] The "trigger date" for

[41] By using the ACRS final report as the trigger date for evidentiary hearing filings on safety contention issues, we are accelerating the Subpart L evidentiary hearing on pending safety contentions by several months.

the initiation of filings associated with admitted environmental contentions shall be the date when the NRC Staff makes the FEIS publicly available.[42]

1. Initial Statements of Position, Testimony, Affidavits, and Exhibits

Sixty (60) days after the appropriate trigger date, each party shall file, on a contention-by-contention basis, its initial written statement of position, exhibits, and written testimony with supporting affidavits, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that sets out affirmative arguments and applicable legal standards, identifies witnesses and evidence, and specifies the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for its statements or position.

2. Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits

No later than twenty (20) days after service of the materials submitted under section I.1, each party shall file its written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for its statements or

[42] 10 C.F.R. § 2.332(d) prohibits the commencement of evidentiary hearings on environmental issues until after issuance of the FEIS. It also prohibits commencement of evidentiary hearings on safety issues until after the FSER, unless the Board affirmatively finds that the safety hearing can be held earlier and will expedite the ultimate resolution of the case.

position. Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.

3. Motions in Limine or to Strike

No later than ten (10) days after service of the materials submitted under section I.2, each party shall file its motions in limine or motions to strike regarding the materials submitted under sections I.1 and I.2. Answers to such motions shall be filed no later than seven (7) days after service of the subject motion.

4. Proposed Questions for Board to Ask[43]

No later than thirty (30) days after service of the materials submitted under section I.2, each party shall file its proposed questions for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The direct or rebuttal examination plans should contain a brief description of the issue or issues that the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. The proposed direct examination questions and plans should be filed in camera and not served on any other party.

5. Motions for Cross-Examination

No later than thirty (30) days after service of the materials submitted under section I.2, each party shall file its motions to conduct cross-examination of a specified witness or witnesses, if any, together with the associated cross-examination plan(s), pursuant to 10 C.F.R.

[43] A party should cover all essential points in the direct and rebuttal testimony that it prefiles for each of its own witnesses. The prefiled proposed questions should not focus on a party's own witnesses, but should instead be directed to the witnesses of the other parties.

§ 2.1204(b). Such motion to conduct cross-examination shall be filed with all parties, but the cross-examination plan itself should be filed in camera and not be served on any other party.[44]

6. Evidentiary Hearing

Although the specific time and date for the evidentiary hearing sessions will be determined later, the Board currently contemplates that these sessions will commence between thirty (30) and seventy-five (75) days after the service of the material specified in sections I.4 and I.5.

7. Witness with Written Testimony Must be Available in Person

Unless the Board expressly provides otherwise, each party must, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony attends the evidentiary hearing in person and is available to testify and to respond orally to questions.[45]

J. Attachments to Filings

1. Documents Must be Attached

If a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), then a copy of that document, or the relevant portion thereof, shall be submitted with

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[44] As expressed by another Licensing Board:

> The standard for allowing the parties to conduct cross-examination is the same under Subparts G and L, to wit – the Administrative Procedure Act (APA) standard for cross-examination in formal administrative proceedings as set forth in 5 U.S.C. § 556(d) ("A party is entitled . . . to conduct such cross examination as may be required for a full and true disclosure of the facts."). See Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004); see also 69 Fed. Reg. at 2,195-96.

Progress Energy Fla., Inc. (Combined Licensed Application for Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 145 (2009).

[45] If, after reading the pre-filed testimony, the Board concludes that is has no questions for a particular witness, it will so advise the parties and that individual will not need to attend the evidentiary hearing. Likewise, if the Board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and will resolve that contention pursuant to 10 C.F.R. § 2.1208.

and attached to the pleading. The pleading must cite to the specific page or section of the document that is relevant.

2. Exception

If the following documents are publicly available on ADAMS, they need not be attached to a motion or pleading: Exelon's ESP Application and Environmental Report, the DEIS, the FEIS, the AFSER and the FSER. With regard to such documents, it is sufficient if the pleading clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the specific page or section that is relevant.[46] All other documents (or the relevant portions thereof that cannot be found in ADAMS) should be attached to the subject pleading.

3. Attached Documents are "Attachments"

All documents referred to in the pleadings (pursuant to the two preceding paragraphs) shall be labeled and referred to as "Attachments," not as exhibits.[47]

4. Designation and Marking of Attachments

A separate numeric designation shall be assigned to each Attachment (e.g., Attachment 3). With regard to Attachments covered by section J.1, the numeric designation shall be prominently marked either on the first page of the appended document or on a cover/divider sheet in front of the appended document.

5. Page Limits/Method of Electronic Submission

Attachments are not subject to the page limitation set forth in section G.1 above. All Attachments associated with a pleading shall be submitted together via the E-Filing system as a

[46] The NRC's E-Filing guidance document has guidance concerning the filing of copyrighted material. See http://www.nrc.gov/site-help/e-submittals/adjudicatory-sub.html (under Related Instructional Resources, access link for Guidance for Electronic Submissions to the NRC, Revision 6 (May 17, 2010)).

[47] The term "exhibit" is reserved for use as a designation for those items that are submitted pursuant to section II.J as proffered evidence for the evidentiary hearing.

single electronic file that consists of the pleading or other submission, the certificate of service, and all the Attachments. If, however, the submission exceeds fifteen megabytes in size, then the pleading should be separated into multiple submissions, each less than fifteen megabytes.[48]

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 10, 2011

[48] This accords with NRC's E-Filing guidance. See http://www.nrc.gov/site-help/e-submittals/adjudicatory-sub.html (under Related Instructional Resources, access link for Guidance for Electronic Submissions to the NRC, Revision 6 (May 17, 2010) at 14).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
EXELON NUCLEAR TEXAS HOLDINGS, LLC	)	Docket No. 52-042-ESP
(Victoria County Station)	)	
	)	
	)	
(Early Site Permit)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (INITIAL SCHEDULING ORDER), dated August 10, 2011, have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 10th day of August 2011.